APPEAL NO. 022286
FILED OCTOBER 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 19, 2002. The hearing officer determined that the appellant (claimant) did not have disability after May 25, 2001, through the date of the CCH, from a compensable injury sustained on _____. The claimant submitted a lengthy appeal of the result in this case, and specifically disputes several matters set forth in the Statement of the Evidence. She disagrees with the statements that the employer put the claimant on a list of people to receive light duty, and the claimant would have received the next light duty job available for which she was qualified; the claimant determined that the voluntary separation package was in her best interest, she requested the employer to allow her to participate in the voluntary separation program, and she voluntarily left the employment of the employer as of May 25, 2001; that she had been offered light duty commensurate with her permanent restrictions; and that the employer had an aggressive program to provide light duty to injured workers, and it had previously provided her five or six months of light duty before she began losing time from work. The claimant appeals Findings of Fact Nos. 8, 9, 10, 11, and 12, and Conclusion of Law No. 3. The respondent (carrier) responds to the claimant's appeal, urging the correctness of the hearing officer's determination that there was no disability.

DECISION

Affirmed.

The claimant worked for the employer for more than 14 years. She sustained a compensable repetitive trauma injury to her left upper extremity on _____. She was placed on light duty and continued working until January 27, 2001, when she had surgery due to her injury. On May 2, 2001, the claimant was given a release to return to work, with permanent restrictions. On May 1, 2001, the employer had submitted a Supplemental Report of Injury (TWCC-6) to the carrier indicating that the employer was unable to "accommodate [the claimant's] permanent restrictions." Even though the employer had indicated it did not have a position that could accommodate the claimant's permanent restrictions, it sought to offer the claimant a position. The employer did not immediately have light duty available but the claimant was told that she would be put on the list for light duty and she was the next in line to receive a light duty assignment.

Also during the first week of May 2001, the employer gave an offer of a Voluntary Severance Package to all its employees to reduce its workforce because it was downsizing. The release that accompanies the claimant's severance package states:

> I understand by signing this General Release I am not releasing claims for benefits under the [employer's] employees benefits plans. Nor am I

> waiving any other claims or rights, which cannot be waived by law, including the right to file an administrative charge of discrimination, and the right to file or pursue a worker's [sic] compensation claim.

The claimant testified that she discussed the release with JS, the person who handles the workers' compensation claims for the employer, and was assured it would not affect her workers' compensation benefits. JS admitted that she "assured [the claimant] that as far as her workers' compensation claim…she had life time medical benefits," but she denied that she spoke with the claimant about whether the severance package would affect the claimant's temporary income benefits (TIBs). On May 25, 2001, the claimant ultimately decided to accept the voluntary severance package that included $12,000 as severance pay.

The claimant testified that she still has restrictions, that she has not looked for a job because she still has restrictions and pain, and that she is to have another surgery after the first surgery of January 27, 2001, has completely healed. JS testified that although the claimant had not actually been offered a position, had the claimant not taken the severance, the employer would have placed the claimant in a job commensurate with her restrictions.

The parties both cite to our decision in Texas Worker's Compensation Commission Appeal No. 012361, decided November 19, 2001. In that case, we affirmed the hearing officer's finding of no disability, stating that there was evidence from which the hearing officer could determine that the claimant, who had been working light duty, took a voluntary separation package, but could still be working but for taking the voluntary separation package, and that the employer did not retract the offer of light-duty employment. The distinguishing fact in that case is that the claimant was already working light duty when he opted to take a voluntary separation package and also retired from the workforce, while the claimant in this case was on disability, awaiting the opportunity to work light duty, when she opted to take the severance package being offered to all employees of employer. The claimant argues that the carrier has terminated TIBs by having the injured worker sign into a separation program, and that this circumvents workers' compensation law and is against public policy. While we might agree with that proposition if the employer had only offered a severance package to injured workers, that case is not before us. It is clear from the Statement of the Evidence that the hearing officer placed great emphasis on the fact that the severance package was offered to <u>all employees</u>. We do not view this as circumventing workers' compensation law or being against public policy. The evidence supports the hearing officer's determination that the claimant requested the severance package and voluntarily left the employment on May 25, 2001. Under those circumstances, the evidence supports the hearing officer's determination that the claimant did not have disability after May 25, 2001.

We do not find the claimant's assertion that she relied on the release which allowed her to pursue a workers' compensation claim to be helpful to her in this case. The hearing officer recognized in the Statement of the Evidence that acceptance of the

severance package would not affect any of the workers' compensation benefits to which the claimant "might otherwise be entitled." The claimant still has her "right to file or pursue her workers' compensation claim." In fact, she is doing just that with the current case going through the dispute resolution process. Her claim, however, is just that--a claim for benefits--and she still has to prove entitlement to benefits. The hearing officer heard her claim and decided that she had not proved her claim, and, as such, she had not proved her entitlement to benefits.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and determine what facts have been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). As to the factual matters challenged by the claimant in her appeal, we note that the hearing officer was acting within his discretion in deciding what facts were established. Nothing in our review of the record reveals that the hearing officer's determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We do not address the claimant's appeal of Finding of Fact Nos. 10 and 11, as extent of injury was not an issue in the CCH, nor was it decided by the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent. First, I note that the issue before the hearing officer was disability. Disability is defined by the 1989 Act as the "inability to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). There is no evidence that the claimant's physical ability to work changed between May 24, 2001, and May 25, 2001. The only thing that changed was that the claimant accepted the severance package offered by her employer. I find nothing in the 1989 Act or in the rules of the Texas Workers' Compensation Commission (Commission) that provides that the acceptance of a severance package can end disability. Thus the decisions of the hearing officer and of the majority in my mind constitute judicial legislating, or at least judicial rule-making—functions which should be left to the Texas Legislature or to the Commissioners of the Commission.

The hearing officer appears to attempt to disguise his intrusion into legislation by covering it with a patina of bona fide offer. The problem with this glaze is that there was no bona fide offer of employment made in this case. While a bona fide offer of employment certainly may end entitlement to TIBs, there are very specific requirements that must be met to establish that a bona fide offer has been made. *See* Section 408.103(e); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). Obviously, these requirements were not met in this case by the employer's future conditional offer that it would provide the claimant with employment when and if work meeting her restrictions became available. While the hearing officer seems to be impressed with the fact that the employer had previously provided the claimant with light duty, this previous offer was made prior to her surgery and before she was placed on much more severe physical restrictions.[1] Thus the prior light duty was no indication of any future light duty work under the claimant's postsurgery restrictions. Nor would the fact that the claimant had worked light duty at some point in the past transform the employer's future conditional nonoffer into a bona fide offer meeting the requirements of Rule 129.6.

The only basis on which the hearing officer's decision could be even arguably affirmable would be the application of some sort of equitable doctrine. However, neither

[1] Just to get an idea how severe the claimant's restrictions are one only has to look to a report dated May 2, 2001, which is the operative report releasing the claimant to return to work, but which provides that such return to work would be only under the following restrictions:

Lifting maximum 2 pounds:	1-33% of workday
Pushing/pulling maximum 2 pounds	1-33% of workday
Reaching above the shoulder	1-33% of workday
Grasping/squeezing	0% of workday
Repetitive hand/wrist motion R/L	0% of workday
Sitting	65-100% of workday
Standing/Walking	65-100% of workday
Squatting/kneeling	1-33% of workday
Repetitive bending/stooping	0% of workday
Climbing	0% of workday

the hearing officer nor the majority really articulates what equitable doctrine might be applicable. The hearing officer attempts to characterize the claimant's acceptance of the severance package as a voluntary removal of herself from the job market. However, there was no attempt to link this factual characterization with any legal doctrine whatsoever, other than the fact that the hearing officer seems to have been offended by the claimant's acceptance of the severance package while claiming workers' compensation benefits. If one were weighing the equities in this case, it appears to me that the claimant has a strong equitable argument in her favor in that she had a right to the severance package based upon her past service, the employer made the offer of the package, and the offer clearly stated in its terms that by accepting, the claimant was not waiving her right to her workers' compensation claim. To now essentially find that the claimant somehow waived her right to workers' compensation benefits by accepting the severance package offered by employer appears to me to turn equity on its head. Nor do I find the majority's extraordinary argument that the claimant retains a right without a remedy well-grounded in either law or logic.

However, I would not apply equity in the present case. I would merely reverse the decision of the hearing officer based upon his exceeding his authority in deciding the case on a basis other than the 1989 Act or the rules. I would render a decision that the claimant had disability from May 25, 2001, through the date of the CCH based upon the overwhelming medical evidence in this case which shows that the claimant is under extremely severe restrictions due to her compensable injury, which render her unable to obtain and retain employment at wages equivalent to the preinjury wage.

_____

Gary L. Kilgore
Appeals Judge